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No. 800

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IN THE

Supreme Court of the United States

October Term, 1962

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

Petitioners,

—against—

MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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No. .....

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

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MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

The petitioners, William J. Adams, d/b/a Beacon Hill Company, Coral, Inc. and Louis Rait, Inc., pray that a writ of certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, Second Judicial Department, entered in the office of the Clerk of the Appellate Division on November 13, 1962, unanimously affirming, without opinion, an order of the Supreme Court, Queens County, entered in the office of the Clerk of Queens County on May 15, 1961.

Opinions Below

The New York Appellate Division, Second Department, rendered no opinion. The Supreme Court, Queens County, rendered an opinion on April 17, 1961, reproduced as Appendix I, *infra* pp. 25-34. This opinion is reported. *Adams v. Hirsch*, 29 M. 2d 641, 214 N. Y. S. 2d 796.

The Supreme Court, Queens County, in effect reversed an order of Chief Judge Walter Bruchhausen of the federal District Court for the Eastern District of New York in *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D. N.Y. 1960). Judge Bruchhausen rendered an opinion, reproduced at Appendix II, *infra* pp. 35-40.

Judge Bruchhausen's order also had the strong support of a two to one decision of the Court of Appeals for the Second Circuit in *Hirsch v. Bruchhausen*, 284 F. 2d 783 (2d Cir. 1960), with Circuit Judge Charles E. Clark writing the majority opinion in which Circuit Judge Calvert Magruder concurred, and Circuit Judge Henry J. Friendly writing a dissenting opinion. These opinions are reproduced in App. III, *infra* pp. 41-52.

Jurisdiction

The final order of the New York Appellate Division, Second Department, was entered on November 13, 1962, reproduced as Appendix IV, *infra* pp. 53-54. Thereafter the petitioners moved in the New York Court of Appeals for leave to appeal pursuant to §589(3)(b) of the New York Civil Practice Act. One of the grounds was the failure of the Supreme Court, Queens County, to give full effect to Judge Bruchhausen's order substituting the respondents

for the never-existent Beland Realty Corporation. Respondents filed an affidavit in opposition in which they asserted that the order and judgment of the Supreme Court, Queens County, did "not finally determine the controversy within the meaning of the New York State Constitution", citing Cohen and Karger, *Powers of the New York Court of Appeals*, §41, at p. 163 and p. 26. The petitioners filed a reply affidavit in which they pointed out that the order appealed from ordered "the action herein dismissed against each and all of the defendants", and that this occurred after the statute of limitations had run on the petitioners' claims, citing *H. P. Drewry* v. *Onassis*, 291 N. Y. 779 (1944); *Ball* v. *Canadian Pacific Steamships*, 276 N. Y. 650 (1938). It is difficult to see how any order, or any judgment for that matter, could have any greater finality than the order in question, or could have more finally determined a controversy.

Nevertheless, on December 31, 1962 the New York Court of Appeals dismissed the petitioners' motion for leave to appeal to that court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." *Adams* v. *Hirsch*, N. Y. Law Jour., Jan. 3, 1963, p. 12, col. 2. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Was the order of the federal District Court for the Eastern District of New York in *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D.N.Y. 1960), substituting the respondents for the never-existent Beland Realty Corporation, binding on the Supreme Court, Queens County, in *Adams* v. *Hirsch*, 29 M. 2d 641, 214 N. Y. S. 2d 796 (1961)?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Art. VI, par. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Rule 4(h) of the Federal Rules of Civil Procedure:

"**Rule 4. Process**

* * * * *

"**(h). Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."

3. Rule 15(a) and (c) of the Federal Rules of Civil Procedure:

"**Rule 15. Amended and Supplemental Pleadings**

"**(a) Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or

within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * * * *

"**(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

4. Rule 21 of the Federal Rules of Civil Procedure:

"**Rule 21. Misjoinder and Non-Joinder of Parties.**

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

5. Rule 25(c) of the Federal Rules of Civil Procedure:

"**Rule 25. Substitution of Parties.**

* * * * *

"**(c) Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

6. Rule 81(c) of the Federal Rules of Civil Procedure:

"**Rule 81. Applicability in General**

* * * * * *

"**(c) Removed Actions.** These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. * * * "

7. New York Civil Practice Act, §222-a:

"**Action or proceeding in partnership name.**

"Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with like effect as though all of the persons had been named as defendants by their own respective names. Where a judgment is taken against the defendants, the clerk with whom the judgment-roll is filed, must write upon the docket opposite the name of each defendant upon whom the summons was served, the word "summoned"; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. An execution upon such judgment may be collected out of the real and personal property of the partnership, and out of the real and personal property of the persons summoned, whose names shall be indorsed on the execution."

8. New York Civil Practice Act, §237-a, 1, 2 and 4:

"**Defendant's special appearance.** 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person

not subject to the jurisdiction of the court, must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

"2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objecting to the court's jurisdiction over the subject matter.

"4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."

Statement of the Case

The petitioners brought their action in Queens County Supreme Court against the Beland Realty Corporation, alleging it to be a New Jersey corporation. There was no such precise entity, and never had been. There had been a Beland Realty Corporation of New Jersey, a New Jersey corporation; and there had been a Beland Realty Corporation, a New York Corporation. The New York corporation owned all of the stock of the New Jersey corporation, as well as the premises involved in the instant action. Both corporations were dissolved on May 1, 1952, more than two years before the institution of this suit. The assets of these corporation were transferred to the respondents, d/b/a Beland Realty Company, a partnership.

The petitioners sought to recover damages resulting from the flow of water into their premises 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of the building. The owner, we now know, was the respondent partnership. But the petitioners were not aware of this when they brought their action, nor for some time thereafter.

The summons and complaint were served in October 1954 on Ernest Boehm, the superintendent or managing agent of the premises. He turned them over to the respondents, and they then engaged upon the disingenuous course of conduct about to be related.

The respondents sent the summons and complaint to Rosenthal & Klein, their insurance brokers. Rosenthal & Klein, in a letter of November 2, 1954, acknowledged receipt of the summons and complaint and advised that they were that "date forwarding same to our insurance company". They also suggested that the respondents have their attorneys contact Mr. Martin Rosen, the attorney for the petitioners, for an extension of time within which to plead. The insurance company to whom Rosenthal & Klein sent the summons and complaint was the Berkshire Mutual Fire Insurance Company, which had issued a policy on the premises in question to the respondent partnership.

Thereafter the law firm of Goldstein, Golenbock & Barell (subsequently Golenbock and Barell), representing the respondents, as well as the law office of Max J. Gwertzman, representing the Berkshire Mutual Fire Insurance Company as well as the respondents, requested of Mr. Rosen, and obtained, repeated extensions of time on behalf of the respondents to answer the complaint.

Finally on January 3, 1955 Mr. Gwertzman, acting both for the insurance company and the respondents, sought removal of the action to the federal District Court for the Eastern District of New York because of diversity of citizenship. He did this in the name of the never-existent Beland Realty Corporation. For this purpose the respondents, without disclosing that there was no New Jersey corporation with the name simply of Beland Realty Corporation, and without disclosing further that the Beland Realty Corporation of New Jersey had been dissolved on May 1, 1952, caused Joseph W. Levin as "the assistant secretary of the Beland Realty Corporation" to sign a removal petition which fallaciously stated:

> "That the said defendant, Beland Realty Corporation, now is and was for a long time prior thereto, still is and was at the commencement of this action, a foreign corporation, duly organized and existing under and by virtue of the Laws of the State of New Jersey".

This removal petition also denied that the "Beland Realty Corporation" had been guilty of negligence:

> "That the defendant, Beland Realty Corporation, has refused to pay the said losses on the ground that it claims the damage which may have been sustained was in no way caused by any negligence or fault on its part".

In the verification to the petition Mr. Levin fallaciously swore:

> "that he is the Assistant Secretary of Beland Realty Corporation, a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, the defendant in this action."

On January 6, 1955 Mr. Gwertzman, on behalf of the respondents, filed an answer in the federal District Court in the name of the fictional Beland Realty Corporation. This answer was a general denial.

In the federal court, in the words of Judge Bruchhausen: "all preliminary examinations were thoroughly conducted by both sides". Mr. Rosen, for the petitioners, served notice to take the deposition of the defendant Beland Realty Corporation, by Mr. Ernest Boehm, superintendent of defendant's premises at 32-02 Queens Boulevard, Long Island City, New York". Mr. Gwertzman, on behalf of the respondents, served notice to take the depositions of the petitioners, William J. Adams, d/b/a Beacon Hill Company, Coral, Inc. and Louis Rait, Inc. as well as the Home Insurance Company.

Pursuant to the notice of petitioners, Mr. Gwertzman on behalf of the respondents produced Ernest Boehm for examination by Mr. Rosen. Mr. Rosen's second and third questions and Mr. Boehm's answers were as follows:

> "2. Q. Are you an employee of the Beland Realty Corp., and were you so employed on or about Jan. 18th, 1954? A. Yes.
>
> "3. Q. How long had you been employed by that Corporation and in what capacity? A. For four years as Superintendent of the building".

In addition to the examinations before trial, Mr. Gwertzman, on behalf of the respondents, also served notice of demand on the petitioners for answers to interrogatories under oath pursuant to Rule 33 of the Federal Rules of Civil Procedure; and thereafter entered into a stipulation with reference to those interrogatories with Mr. Rosen.

After the examinations before trial, the case was placed on the trial calendar. At the pre-trial call before Judge Royce H. Savage, the respondents in the name of the fictional corporate entity, moved for the dismissal of the complaint on the ground of nonownership, management or control. At that pre-trial, counsel for the respondents exhibited a deed from the New York corporation to the respondent partnership transferring the premises in question to the respondents. Until that time the respondents had concealed this fact. All notices of claims and pleadings were turned over to the attorneys for the partnership, who in turn forwarded them to the attorneys for the insurance company.

With reference to the full participation by the respondents in the instant litigation until after the statute of limitations had run, Chief Judge Bruchhausen correctly observed:

> "In the case at bar the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. . . ."
>
> . . . . . .
>
> "Mr. Boehm who was served cannot be classified as a mere janitor. His examination before trial clearly indicates that Mr. Boehm as superintendent was in charge of the premises and of men working under his direction. He was served by the plaintiff and gave the papers to the partners who acted upon them. The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to

> dismiss before Judge Savage, after the statute of limitations had expired." *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680, 681, 682 (D.E.D.N.Y. 1960).

The petitioners then moved, pursuant to Rules 15 and 4(h) of the Federal Rules of Civil Procedure, to amend the title of the instant action by substituting Myrtle G. Hirsch, Lenora Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch, d/b/a Beland Realty Company, as parties defendants in place of Beland Realty Corporation. Judge Bruchhausen granted their motion. However, on this state of the record there being no diversity, he also remanded the case to the Queens County Supreme Court., *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D.N.Y. 1960).

The respondents appealed to the United States Court of Appeals for the Second Circuit. On October 19, 1960 the federal Court of Appeals dismissed the appeal for lack of an appealable order. Then the respondents petitioned the Court of Appeals for the Second Circuit for a writ of mandamus to compel Chief Judge Bruchhausen to vacate his order. This petition was denied by a two to one decision, *Hirsch* v. *Bruchhausen*, 284 F. 2d 783 (2d Cir. 1960), with Circuit Judge Clark writing the majority opinion in which Judge Calvert Magruder concurred, and Circuit Judge Henry J. Friendly writing a dissenting opinion. The Second Circuit felt not only that Judge Bruchhausen had "clear authority" but also that it was his "manifest duty" to order the amendment substituting the defendants for the never-existent corporation:

> "F.R. 81(c) provides as to 'Removed Actions': 'These rules apply to civil actions removed to the United States district courts from the state courts

> and govern procedure after removal. Repleading is not necessary unless the court so orders.' See Freeman v. Bee Machine Co., 319 U. S. 448, 63 S. Ct. 1146, upholding amendment to state a new claim after removal. Thus Judge Bruchhausen had clear authority to order the amendment substituting parties, see F.R. 24, 25 (a)(c); and it was his manifest duty to do so and to make sure that the real issue was litigated between the parties actually involved". 284 F. 2d at 786.

With reference to the guileful conduct of the respondents the Court of Appeals commented:

> "... There is no permanent prejudice to them to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for, whatever its past vicissitudes, the case remained pending and obviously must now be heard in the proper tribunal therefor." 284 F. 2d at 786.

The respondents then applied to Mr. Justice John M. Harlan for a stay pending a writ of certiorari to this Court. *Hirsch* v. *United States Court of Appeals for the Second Circuit*. On December 12, 1960 Mr. Justice Harlan denied this application with the endorsement: "I can find no equity in this application or any other reason for granting the stay which the Court of Appeals has denied. Application denied." The report of Mr. Justice Harlan's ruling is reproduced in Appendix V, *infra*, pp. 55-56.

Nevertheless, when the case returned to the Queens County Supreme Court, Mr. Justice Samuel Rabin granted the

respondents' motion, made pursuant to §237-a of the Civil Practice Act to dismiss the proceedings on the ground that service of process was not made in the manner provided by §222-a of the Civil Practice Act. *Adams* v. *Hirsch*, 29 M. 2d 641, 214 N. Y. Supp. 2d 796 (1961). The Appellate Division, Second Department affirmed, without opinion, Mr. Justice Rabin's order.

It is submitted that the principle of judicial finality, as expressed in the doctrines of comity and the law of the case, requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, should have been given full effect by the Queens County Supreme Court. The petitioners argued before the Queens County Supreme Court that Judge Bruchhausen's order was binding upon it. The Queens County Supreme Court expressly ruled to the contrary. (App. 1, pp. 25-34.)

REASON FOR GRANTING THE WRIT

The Queens County Supreme Court, in refusing to give full force and effect to Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, decided a federal question of substance not theretofore determined by this Court.

A.

The courts below, in failing to apply the principle of judicial finality as expressed in the doctrines of comity and the law of the case, violated the principles which govern the relations between state and federal courts of the same state.

The Anglo-American legal system developed a principle of judicial finality. If an individual had once been required to litigate a disputed point, that was usually an end of the matter. It might be either in a criminal or a civil proceeding. It might be either with the state or another individual.

This principle was for the benefit not only of the individual, but also of the courts. It saved the time of the courts and made for the more expeditious and efficient disposition of judicial proceedings. Moreover, and certainly not least, the principle of judicial finality made for greater certainty in the law and fostered the growth of the rule of law.

The principle of judicial finality has expressed itself in various forms: double jeopardy; *res judicata*; collateral estoppel; full faith and credit; comity; law of the case; and stare decisis or the doctrine of precedents. The two forms of judicial finality which are dispositive of this case are comity and the law of the case.

B.

Comity requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, be given full force and effect in the instant proceedings.

The parts of the principle of judicial finality which are particularly applicable to this case are comity, and the law of the case. Comity requires that Chief Judge Bruchhausen's order substituting the defendants for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, be given full force and effect in the instant proceedings. Many decisions point in this direction.

In *People ex rel. American Surety Co. v. Benham*, 71 Misc. 345, 128 N. Y. Supp. 610 (1911) the court stated:

> "* * * The interference of either a State court with federal jurisdiction or of a Federal court with State jurisdiction is one of such great delicacy that any conflict must sedulously be avoided so that each may carry out its functions within its proper sphere without embarrassment." 71 Misc. at 356; 128 N. Y. Supp. at 617-18.

In *Paramount Pictures v. Blumenthal*, 256 App. Div. 756, 11 N. Y. S. 2d 768 (1st Dept. 1939), appeal dismissed and certified question not answered, 281 N. Y. 682, 23 N. E. 2d 15 (1939), the plaintiff and defendant were both residents of New York. The defendant sued the plaintiff in England, and the plaintiff sought to enjoin this action. This was denied. In the course of the denial the court reasoned that the appropriate forum in which to test the effect of an alleged service of process, issued in an action brought in a court in a foreign country, was in such court, and the state

court would not pass upon the question of such foreign court's jurisdiction.

Similarly, in *West Virginia Motor Truck Ass'n* v. *Public Service Commission*, 123 F. Supp. 206 (D.S.D.W. Va. 1954), affirmed 348 U. S. 881 (1954), a federal three-judge court toward the close of its opinion stated:

> "While we do not base our decision primarily on that principle, we think the result reached is a happy one in that it respects that spirit of comity which decries undue interference between federal courts and the courts of a State." 123 F. Supp. at 216.

Leszynski v. *Russ*, 192 F. Supp. 422 (D.Md. 1961), involved a new Maryland statute which purported to authorize substituted service on non-resident owners of watercraft. The defendant filed a special preliminary defense attacking the court's personal jurisdiction over the defendant by this substituted service. District Judge Chestnut overruled this special defense, although without prejudice.

In *In re Commercial Nat. Bank*, 45 F. Supp. 482 (D.E.D. Pa. 1942), affirmed sub nom *In re Reed*, 134 F. 2d 172 (3d Cir. 1943), the court observed:

> "Principles of comity require that the national courts and the state courts should function as a harmonious and unified system in the administration of law; * * *" 45 F. Supp. at 485.

Comity has various other applications. It is applicable to decisions between federal courts in different districts. See, *e.g.*, *General Motors Corp.* v. *Bendix Aviation Corp.*, 123 F. Supp. 506 (D.N.D. Ind. 1954).

It persuades courts to let that tribunal which first has property, to adjudicate with reference to it. See *e.g.*, *In re Bean*, 207 App. Div. 276, 201 N. Y. S. 827 (4th Dept. 1923), aff'd 238 N. Y. 618, 144 N. E. 916 (1924).

In *Haag* v. *Barnes*, 11 A. D. 2d 430, 207 N. Y. S. 2d 624 (1st Dept. 1960), an Illinois agreement by which a putative father paid a certain sum for release from all legal liability, was sustained in New York and a New York paternity suit complaint was dismissed. The court stated:

> "* * * If no policy of the forum is offended, comity and good morals require recognition of the agreement, * * *." 207 N. Y. S. 2d at 628.

In *Halladay* v. *Worthington*, 99 Misc. 141, 156, 163 N. Y. Supp. 362, 371 (1916), the court stated:

> "* * * Where the act done is valid in the state where the parties are, and where the personal property is, it must be held to be valid in the courts of that state, and also by international comity in the courts of the other states."

In *Universal C.I.T. Corp.* v. *Vogt*, 165 Neb. 611, 86 N. W. 2d 711 (1957), in allowing an Oklahoma chattel mortgage to prevail over a Nebraska judgment creditor, the court held and said: "In *Kenny Loan Finance Co.* v. *Summer*, 159 Neb. 57, 65 N. W. 2d 240, this court held: 'Ordinarily, foreign law or valid rights based thereon will be given effect or enforced under the doctrine of comity unless opposed to the settled public policy of the forum.'" 165 Neb. at 618.

Comity exists as well between courts of different countries. For example, in *Hartens* v. *Hartens*, 284 N. Y. 363 (1940), the New York Court of Appeals held and said:

> "Judgment of courts of foreign countries are received in evidence in our courts when duly authenticated but they differ from judgment of courts of our sister States to which by constitutional mandate, full faith and credit must be given. They must not contravene our public policy." At 365.

There is even a comity of nations which applies to the acts of foreign states. For example, in *Anderson* v. *N.V. Transandine Handelmattschapij*, 289 N. Y. 9 (1942), the New York Court of Appeals held and said:

> "* * * By comity of nations, rights based upon the law of a foreign state to intangible property, which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the rule of law." * * *". At 19.

Accord: *Horn* v. *Vassen*, 263 App. Div. 669, 34 N. Y. S. 2d 265 (1st Dept. 1942) (movable assets in this jurisdiction) ("The plaintiffs are clearly entitled to an accounting both under the laws of Germany and of this State").

The doctrine of comity should apply with even greater strength between our state and federal courts. After all, they are all courts of the same unified federal system. When a case moves from a state to a federal court, and then back to the state court, it should carry with it the procedural determinations in each of the preceding tribunals. *Cf. Kennedy* v. *Falk*, 230 F. 2d 362 (7th Cir. 1956).

C.

The law of the case also requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, with the support of the Court of Appeals for the Second Circuit, be given full force and effect.

Our federal and state governments are but parts of one integrated governmental system. Taken together they form the government of one federal state. Under our close-knit federal system, federal courts are courts as well of the states in which they sit. As the court reasoned in *Application of Wasserman*, 240 F. 2d 213 (9th Cir. 1956):

> "* * * The jurisdictional boundaries of no United States District Court cross the boundaries of a state. Each is considered a court of the particular state in which it sits and by which it is bounded. In diversity of citizenship cases, each is bound by the statutory and decisional law of the state in which it sits, even as to doctrines of law." At 214.

Thus in *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185 (1959), this Court held that a federal district court in Pennsylvania could take diversity jurisdiction in a state eminent domain case involving a Pennsylvania County. The Court reasoned:

> "But adjudication of the issues of this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials. The only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather

> than for public use. The District Court would simply be acting as would a court of the State in applying to the facts of this case the settled state policy that a County may not take a private citizen's land under the State's power of eminent domain except for public use." At 189-90.

Accordingly, the law of the case should be held appropriately applicable between federal and state courts sitting in the same state; for the federal courts too are state courts. Especially should the law of the case be applicable to the instant case, for the United States Court of Appeals for the Second Circuit strongly supported Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation. Indeed, the Federal Court of Appeals stated not only that Judge Bruchhausen had "clear authority" but also that it was his "manifest duty" to order the amendment.

The doctrine of the law of the case is another of the many facets of the principle of judicial finality. Like the other facets of this principle it seeks to avoid the waste of a second resolution of issues already determined.

Although the doctrine of the law of the case is particularly applicable to a tribunal of co-ordinate jurisdiction, it is not so limited. It is also applied in a reviewing court to a charge to the jury of a trial court which is not objected to. See, *e.g. Brown* v. *Du Frey*, 1 N. Y. 2d 190 (1956); *Bucken* v. *Long Island R.R. Co.*, 286 N. Y. 146 (1941); *Berner* v. *Board of Education*, 286 N. Y. 174 (1941). Or again, the law of the case is applied by a reviewing court to orders of a lower court not appealed from. See, *e.g. Foley* v. *Equitable Life Assur. Soc.*, 263 App. Div. 605, 33 N. Y. S. 2d 917 (2d Dept. 1942).

As between courts of co-ordinate jurisdiction, the court in *Schumann* v. *Loew's Incorporated*, 144 N. Y. S. 2d 27 (1955), well said "that one Justice, under the law of the case rule, may not overrule the holding of another Justice of co-ordinate jurisdiction." At 29.

The law of the case should be held particularly applicable between state and federal courts sitting in the same state. They are both state courts. Thus the law of the case as well as comity suggests that Mr. Justice Rabin should have given full force and effect to Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation. Not only do the doctrines of comity and the law of the case suggest this result, but also it is pertinent to emphasize that the United States Court of Appeals for the Second Circuit strongly supported Chief Judge Bruchhausen's order, stating that he had "clear authority" for it and that it was his "manifest duty" to make it. It can even be urged that stare decisis of the most persuasive character should have weighed with Mr. Justice Rabin to tip the scale in favor of comity and the law of the case.

D.

Moreover, the disingenuous conduct of the defendants should estop them from challenging Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation.

One further consideration supports the position of the petitioners with reference to the finality of Chief Judge Bruchhausen's order, and that is the disingenuous conduct of the defendants. Their conduct should estop them from challenging Chief Judge Bruchhausen's order substituting them for the never-existent Beland Realty Corporation. As

the United States Court of Appeals for the Second Circuit truly observed:

> "* * * There is no permanent prejudice to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for whatever its past vicissitudes, the case remained pending and obviously must now be heard in the proper tribunal therefor." 284 F. 2d at 786.

Not only should this Court hold as a matter of law that the doctrines of comity and the law of the case supplemented by stare decisis required the Supreme Court, County of Queens, to give full force and effect to Chief Judge Bruchhausen's order substituting the defendants for the never-existent Beland Realty Corporation; but also this Court should add that the disingenuous conduct of the respondents estops them from challenging this result. *Cf. Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. No. 12,421 (C.C.R.I. 1856), where the court said with reference to a removal by a foreign insurance company to the federal court:

> "By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot after it has been brought here, treat it otherwise." At 609.

This language was quoted with approval in *Farmer v. Nat'l Life Assn.*, 138 N. Y. 265, 271 (1893), which held similarly.

CONCLUSION

The principle of judicial finality as expressed in the doctrines of comity and the law of the case as well as stare decisis, plus the disingenuous conduct of the respondents, required the Queens County Supreme Court to give full force and effect to the order of the federal District Court for the Eastern District of New York substituting the respondents for the never-existent Beland Realty Corporation. Unless and until Chief Judge Bruchhausen's order was reversed by a higher federal court—in the posture of this case, this Court—it was binding in these proceedings. The instant petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX I

Opinion of Rabin, *J.*

(29 Misc. 2d 641, 214 N. Y. S. 2d 796)

(New York Law Journal—April 17, 1961)

The defendants "appearing specially, for the purposes of this motion only" move, pursuant to section 237-a of the Civil Practice Act, for an order dismissing the proceedings "on the ground that service of process was never made on any defendant herein, and this court, in consequence, lacks jurisdiction over the person of any and all of the * * * defendants herein."

This is an action to recover for property damage allegedly sustained on January 18, 1954, when plaintiffs were tenants of lofts in certain premises located in Queens County. They claim that through the negligence of the owner, their stock, merchandise, fixtures and other property were damaged as the result of the flow of water from a fire escape stairwell controlled by the owner of the building. The action was originally brought in this court in November, 1954, solely against "Beland Realty Corporation" which, as alleged in paragraph 2 of the complaint, was a foreign corporation organized under and pursuant to the laws of the State of New Jersey and owned the premises of which the plaintiffs were tenants.

Following the service of a copy of the summons and complaint upon Ernest Boehm, the superintendent or managing agent of the premises, the action was removed on the ground

of diversity of citizenship to the United States District Court for the Eastern District of New York. The petition of "Beland Realty Corporation" was verified on January 3, 1955, by Joseph W. Levin, who stated he was its assistant secretary. In his affidavit sworn to the same date, he stated that this corporation was in existence pursuant to the laws of the State of New Jersey. The answer thereafter served by said defendant denied the material allegations of the complaint, including paragraph 4 thereof, wherein, as already noted, its corporate existence under the New Jersey law was alleged as well as its ownership of the premises at the time of the occurrence underlying the action.

On December 10, 1956, the action was dismissed for lack of prosecution. It was restored to the calendar in 1959, and at a pre-trial conference held thereafter an order was made setting the case down for trial on May 18, 1959, to determine whether "Beland Realty Corporation, designated in the complaint as a New Jersey corporation, may be held legally or otherwise responsible because of its alleged ownership, operation, maintenance and control of premises designated in plaintiffs' complaint * * * for an occurrence which allegedly took place on January 18, 1954 * * * " Such a preliminary trial was never held.

On June 17, 1960, the plaintiffs filed a motion "for an order amending the title of this action by substituting [the movants herein] Myrtle G. Hirsch, Lenore Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch, d/b/a Beland Realty Company as party defendants in place of the defendant Beland Realty Corporation * * * ." This motion was granted and an order made and entered on October 10,

1960, returning the case to this court inasmuch as the members of the partnership, substituted as defendants, were residents of New York and thus diversity of citizenship no longer was present (Adams v. Beland Realty Corp'n, 187 F. Supp. 680).

On October 19, 1960, the United States Court of Appeals for the Second Circuit dismissed the appeal from the foregoing disposition for lack of an appealable order. Thereupon a proceeding, on petition, for a writ of mandamus was instituted in said Circuit Court to compel the judge who made the order of October 10, 1960, to vacate it. This petition was denied by a divided court (Hirsch v. Bruchhausen, 284 F. 2d 783). An application for a stay pending a writ of certiorari to the Supreme Court of the United States was denied by one of its justices on December 12, 1960.

According to a photostatic copy of a certificate of the secretary of state of New Jersey, dated May 1, 1959, annexed to the moving papers on the motion to amend the title of this action by substituting the movants as party defendants, no corporation named "Beland Realty Corporation" was ever incorporated under the laws of that state nor was it a foreign corporation authorized to transact business therein. A photostatic copy of a certificate of the Department of State of New Jersey, dated March 24, 1953, also annexed, shows that a corporation of that state, known as "Beland Realty Corporation of New Jersey" was dissolved on May 1, 1952, the certificate thereof having been filed on March 24, 1953. This corporation never owned the premises wherein the plaintiffs allegedly sustained the damages sought to be recovered in this action. All of its issued capital

stock, however, was owned by "Beland Realty Corporation" which had been incorporated in the state of New York on February 28, 1946. This corporation was dissolved by a certificate of dissolution dated May 1, 1952, a photostatic copy of which was also annexed, filed with the Department of State of New York on March 10, 1953.

It was the New York corporation which owned the premises in question until May 1, 1952, when it conveyed the same by deed dated that day (and recorded in the register's office in Queens County on August 18, 1952), to the movants herein, doing business as "Beland Realty Co.," a partnership organized and operating under the laws of the State of New York pursuant to a "Certificate of Partners" executed by them on May 1, 1952, pursuant to section 449 of the Penal Law. Photostatic copies of such deed and certificate were attached to the papers submitted in opposition to the foregoing motion. It is claimed in one of the reply affidavits herein that the very leases of the plaintiffs showed that a partnership was their landlord. A photostatic copy of one of such leases, dated January 30, 1953, to the plaintiff Louis Rait, Inc., likewise annexed to the papers on the motion to amend, shows that the landlord was "Beland Realty Co. of New York, a partnership with an office at 54 Clark Street, Newark, New Jersey."

Thus on January 18, 1954, when the plaintiffs sustained the alleged damages sought to be recovered in this action, the movants, members of a New York partnership, all residing in the State of New York owned the premises occupied by the plaintiffs; "Beland Realty Corporation," the original defendant designated in the summons and com-

plaint, had no corporate existence: "Beland Realty Corporation of New Jersey," dissolved in May 1, 1952, never owned the premises in question, although its capital stock had been owned by "Beland Realty Corporation" organized under the laws of the State of New York; that corporation was the record owner of the property until it was dissolved on May 1, 1952, when it conveyed said property to the movants as partners. Never having been served with process in this action in the manner provided by section 222-a of the Civil Practice Act, they urge that this court never acquired jurisdiction over their persons and consequently the personal judgment sought against them herein is beyond its power to grant.

While the plaintiffs make no claim that any of the movants was ever served with original process, they take the position that the order of the Federal Court substituting defendants is res judicata and conclusive on the question of jurisdiction over the persons of the present defendants.

But, "The common-law doctrine of res judicata, designed to bar relitigation of adjudicated issues, * * * is that an *existing final judgment rendered upon the merits* by a court of competent jurisdiction, is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein * * *" (Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 118; emphasis supplied). It is clear that the order of the Federal Court amending the title of the action and substituting party defendants under its procedure was in no sense a final judgment rendered upon the merits (Bannon v. Bannon, 270 N. Y. 484). As stated in Webb v. Buckelew (82 N. Y. 555, 560), cited in Bannon

(supra); "* * * it is 'only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all.'"

It is this court's opinion that the order amending the title of this action by substituting the movants for the original corporate defendant was no more than order of a court made in the course of the same action [Judge Clark noted in the prevailing opinion of the Circuit Court: "* * * our function has been merely to pass on the procedural aspects of the proceedings as brought before us" (Hirsch v. Bruchhausen, 284 F. 2d at p. 787)]. The numerous Federal and New York cases relied upon by the plaintiffs are not to the contrary. In all of them, the facts clearly establish that the courts were concerned with the effect of a determination in an independent prior action or proceeding and not, as here, with an order in the same action.

Nor is the doctrine of the "law of the case" applicable here. As noted in Walker v. Geril (257 App. Div. 249, 251): "The law of the case, like the principle of stare decisis, is a rule of comity or convenience (Luminous Unit Co. v. Freeman-Sweet Co., 3 F. [2d] 577). Since from its very nature it involves the effect of orders which are interlocutory, it

must be distinguished from res adjudicata (Bannon v. Bannon, 270 N. Y. 484). Accordingly, its effect is limited to a court of coordinate jurisdiction which ordinarily should not disregard an earlier decision on the same question in the same case." "It must be accommodated to the needs of justice by the discriminating exercise of judicial power" (Reamer's Estate, 331 Pa. 117, 122; 21 C. J. S., Courts, sec. 195 p. 334). In Rager v. McCloskey (305 N. Y. 75, 78), the Court of Appeals stated that the doctrine of law of the case, as distinguished from res judicata "is, therefore, not binding upon this court."

While this court claims no right to review a determination of a Federal District Court, it does assert its exclusive power to determine its own jurisdiction over persons upon whom no service of process in accordance with New York's standards was ever made (see Erickson v. Macy, 231 N. Y. 86). As was stated in Matter of Brenner v. Great Cove Realty Co. 16 N. Y. 2d 435, 441-442): "[i]t is settled beyond cavil that a court has jurisdiction to determine the facts upon which its jurisdiction depends (Matter of United States of Mexico v. Schmuck, 294 N. Y. 265, 271-273; Consumers Lbr. Co. v. Lincoln, 225 App. Div. 484, 485; Stoll v. Gottlieb, 305 U. S. 165, 171-172; United States v. Mine Workers, 330 U. S. 258, 289-295; 21 C. J. S., Courts, sec. 113)."

Section 222 a of the Civil Practice Act, added in 1945, permits the prosecution of an action or proceeding by or against a partnership in the partnership name. It provides, in pertinent part, that if the persons carrying on business as partners "be defendants in an action or proceeding, the summons or other process may be served upon any one or

more of them with like effect as though all of the persons had been named as defendants by their own respective names." As already noted, not one of the substituted defendants was ever served with a summons in this action and no such service is claimed by the plaintiffs nor the waiver thereof. It is an ancient rule since Pennoyer v. Neff (95 U. S. 714) that personal service within a state where suit is brought, or the waiver of such service, is required for due process of law to support a personal judgment.

In no aspect can it be said that the situation here presented involves a mere misnomer of the party defendants which would permit the correction of the name. The plaintiffs initially sued "Beland Realty Corporation" which they alleged had its corporate existence in New Jersey. There was no such named corporation, although there was one named "Beland Realty Corporation of New Jersey." The substitution of the latter because of misnomer would have been permissible under New York law, but it never owned the property. A New York corporate entity named "Beland Realty Corporation" owned it until May 1, 1952, as well as the stock of the New Jersey corporation, but this New York corporation was never sued. None of the movants was, according to that corporation's certificate of dissolution, its officers and directors, although a comparison of the names and addresses therein listed with those of the movant's "Certificate of Partners" shows that several were related and resided at the same post office addresses. As was stated by the Appellate Division of the First Department in Abrams v. General Financial Corp'n (274 App. Div. 756, 757): "There is no authority which sanctions an entire

change of name of the defendant or defendants by the substitution of other and entirely different defendants for the one actually served (New York State Monitor Milk Pan Assn. v. Remington Agric. Works, 89 N. Y. 22; Gray v. Vought & Co., 216 App. Div. 230). The court is without power to permit such a substitution, particularly where, as here, it might operate to deprive appellants of the right to plead as a bar to the action that the Statute of Limitations had become effective against plaintiff's claim since the commencement of the action against the corporation (Gray v. Vought & Co., supra, p. 233)."

And so here, the movants cannot be substituted as party defendants in this action for the corporation that the plaintiffs intended to sue in November 1954. In Safrin v. Friedman Hat Company (195 Misc. 387, appeal dismissed 276 App. Div. 853), the court denied the substitution of a partnership with same name as the corporation as party defendant where, as here, the statute of limitations had already barred the claim. The court noted at page 389: "The individual, Joe Friedman, was not a party to this action although the service was made upon him as president of the named corporate defendant. Plaintiff now wishes to substitute Joe Friedman and another as copartners. This would amount to the substitution of entirely different defendants."

Following the denial to substitute the partners for the corporation in Safrin, the plaintiffs commenced a new action against the partners. These defendants moved to dismiss the complaint under Rule 107 of the Rules of Civil Practice solely upon the ground that the alleged causes of action were barred by the applicable statute of limitations.

Mr. Justice Beldock, now an associate justice of the Appellate Division of the Second Department, pointed out in his opinion (Safrin v. Friedman, 96 N. Y. S. 2d 627, aff'd 277 App. Div. 1138) that certain conduct on the part of the defendants in the prior action against the corporation, may be sufficient upon the trial to estop these defendants from availing themselves of the statute of limitations as a bar. Accordingly, he held that: " * * * the interests of justice will best be served by a denial of the motion to dismiss, by the interposition of an answer setting forth the defense of the statute of limitations and by a trial of the issue of estoppel."

A similar trial on the issue of estoppel to assert the bar of the statute of limitations may be available to the plaintiffs on the basis of the conduct outlined in the opinion of the District Court (187 F. Supp. at pp. 681-682) in the pending action in the Supreme Court, New York County, for the same cause brought against the individual defendants in January, 1960.

So far as the instant action is concerned, this court, for the reasons stated, has no jurisdiction over the persons of the individual defendants to grant the in personam judgment here sought.

The motion is granted accordingly.

Settle order.

APPENDIX II

Decision of Bruchhausen, *J.*, Dated September 22, 1960

(187 F. Supp. 680)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

BRUCHHAUSEN, C. J.

This motion is brought pursuant to Rule 15 and Rule 4(h) of the Federal Rules of Civil Procedure to amend the title of this action by substituting Myrtle G. Hirsch, Lenore Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch; d/b/a Beland Realty Company, as party defendants, in place of Beland Realty Corporation.

On January 18, 1954, the plaintiffs allegedly sustained property damage as a result of the flow of water into premises occupied by them as tenants of 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of said premises. The summons and complaint were served upon Ernest Boehm, the superintendent or managing agent of the premises. The complaint described the defendant owner as a New Jersey corporation. The action originally was commenced in Queens County Supreme Court. The defendant denied ownership, operation and control of the premises. It thereupon sought removal of

Appendix II

Decision of Bruchhausen, J., Dated September 22, 1960

the action to this court because of diversity of citizenship. The removal petition was signed by Joseph W. Levin, assistant secretary of Beland Realty Corporation of New Jersey. In his affidavit of January 3, 1955, Mr. Levin alleged that the corporation was in existence pursuant to the laws of the State of New Jersey. However, a certificate of voluntary dissolution was filed May 1, 1952. The stock of this corporation was owned by a New York corporation known as Beland Realty Corporation. This New York corporation owned the premises in question up to May 1, 1952 when it was dissolved. Its property was transferred to the individuals named above d b a Beland Realty Company, a partnership. The defendant corporation was represented at first by the law firm of Golenbock and Barell and then by Max J. Gwertzman, the subrogation attorney. Extensions of time to appear and answer were given to both attorneys. Examinations before trial of both parties were held and the case placed on the trial calendar. At the pre-trial call before Judge Savage the corporation moved for dismissal of the complaint on the ground of nonownership, management or control. At that pre-trial, a deed was exhibited by counsel from the corporation to the partnership transferring the premises to the named individuals. All proceedings were conducted in the name of the dissolved corporation although dissolution was approximately two years prior to the cause of action. All notice of claims and pleadings were turned over to the attorneys for the partnership who in turn forwarded them to the attorneys for the insurance company.

Appendix II

Decision of Bruchhausen, J., Dated September 22, 1960

The defendant contends that a granting of this motion would constitute a substitution of a new party and thereby deny the defendant partnership the benefit of the statute of limitations. Numerous cases are cited by the defendant in support of its contention. However, a careful reading of these cases discloses that they are distinguishable from the case at bar. In the cited cases, the party to be substituted was new; one who had not been served, one who had not appeared in the action nor participated therein. In the case at bar the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. In Green v. Walsh, 21 F.R.D. 15, the court held in part:

> "The granting or denial of an application to amend, in a situation where amendment may be made only by leave of the court, is within the discretion of the trial judge. Moore's Federal Practice, Vol. 3, ¶ 15.08, pp. 833-834; Heay v. Phillips, 9 Cir., 1952, 201 F. 2d 220, 222; Young v. Garrett, 8 Cir., 1947, 159 F. 2d 634; Lorentz v. R.K.O. Pictures, 9 Cir., 1946, 155 F. 2d 84, 88, certiorari denied 329 U.S. 727, 67 S. Ct. 81, 91 L. Ed. 629; Wittmayer v. United States, 9 Cir., 1941, 118 F. 2d 808, 809; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489."

The court added:

> "The rule is to be liberally construed on the side of allowance of amendments, particularly where the opposing party is put to no disadvantage." Barthel v. Stamm, 5 Cir., 1955, 145 F. 2d 487, 490; Hammond-Knowlton v. United States, 2 Cir., 1941, 121 F. 2d

192, 200, certiorari denied 314 U. S. 694, 62 S. Ct. 410, 86 L. Ed. 555; International Ladies' Garment Workers' Union v. Donnelly G. Co., 8 Cir., 1941, 121 F. 2d 561, 563; Fli-Fab, Inc. v. United States, D.C.D.R.I. 1954, 16 R.F.D. 553, 556; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489; Overfield v. Pennroad Corp., D.C.E.D. Pa. 1941, 39 F. Supp. 482, 486-487."

The court further added:

"And, the spirit of the Federal Rules demands that insofar as possible, controversies be determined upon the merits and not upon procedural niceties. Moore's Federal Practice, Vol. 3, § 15.08, p. 828; Copeland Motor Co. v. General Motors Corp., 5 Cir., 1952, 199 F. 2d 566, 567-568; Fli-Fab, Inc. v. United States, D.C.D. R.I. 1954, 16 F.R.D. 553, 556; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489; Fierstein v. Piper Aircraft Corp., D.C.M.D. Pa. 1948, 79 F. Supp. 217, 218; Overfield v. Pennroad Corp., D.C.E.D. Pa. 1941, 39 F. Supp. 482, 485."

In the case of Nelson v. Jadrijevics, 59 F. 2d 25, an amendment correcting the mistaken allegation that the person employing the plaintiff was a corporation, instead of a partnership, held properly allowed.

Rule 4(d) (3) provides how service shall be made upon corporations and partnerships 'or unincorporated associations.' Mr. Boehm who was served cannot be classified as a mere janitor. His examination before trial clearly indicates that Mr. Boehm as superintendent was in charge of the

premises and of men working under his direction. He was served by the plaintiff and gave the papers to the partners who acted upon them. The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to dismiss before Judge Savage, after the statute of limitations had expired. It is evident that no prejudice will flow to the defendant from a granting of this motion. Under Rule 15(c) of the Federal Rules of Civil Procedure amendments relate back to the date of original pleading. The cases are in accord that amendments to pleading relate back, that the issues are to be determined on their merits and mere technicalities are to be disregarded. Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175; Williams v. Pennsylvania R. Co. et. al., 91 F. Supp. 652.

In the interest of justice, courts are to apply liberal rules in permitting amendments. Bainum v. American Bridge Co. of N. Y., 141 F. 179. Rule 15(a) of the Federal Rules of Civil Procedure referring to amended and supplemental pleadings provides in part:

> "* * * and leave shall be freely given when justice so requires."

See also Bowles v. Marx Hide & Tallow Co., 4 F.R.D. 297; Porter v. Theo. J. Ely Mfg. Co., et al., 5 F.R.D. 317.

The defendant alleges that it will lose the defense of the statute of limitations if this motion is granted. The courts have held under similar circumstances where a party had notice of a claim from the beginning the statute does not

apply. Tiller v. Atlantic Coast Line Railroad Co., 323 U. S. 574; Maty v. Grasselli Co., 303 U. S. 197.

The defendants contend that the plaintiff is chargeable with laches and, therefore, barred in making this motion. It is well settled that delay in and of itself is not a sufficient ground to defeat this type motion. It is necessary that the opposing party be prejudiced. County Theatre Co. v. Paramount Film Distributing Corp., 166 F. Supp. 221; Arnold v. Chesebrough, 33 Fed. 571; Fli-Fab, Inc. v. United States of America, 16 F.R.D. 553.

In substituting the partnership in place of the corporation, diversity of citizenship is no longer present. The partnership is a New York organization against which there is pending the identical suit in Supreme Court, New York County. Under these circumstances, the case should be remanded. See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 131 F. Supp. 262.

The plaintiff's motion is granted and the case remanded.

Settle order on notice.

WALTER BRUCHHAUSEN
Chief Judge

APPENDIX III

Opinion of United States Court of Appeals (284 F. 2d 783)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1960.

(Submitted October 31, 1960

Decided November 29, 1960.)

Docket No. 26597

MYRTLE G. HIRSCH, LENORE BENEDEK, JANET BENEDEK, GLADYS COHEN, and HOWARD HIRSCH, doing business as BELAND REALTY COMPANY,

Petitioners,

—v.—

HON. WALTER BRUCHHAUSEN, United States District Judge for the Eastern District of New York,

Respondent.

Before:

CLARK, MAGRUDER and FRIENDLY,

Circuit Judges.

Petition for a writ of mandamus to the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York. Petition denied.

Appendix III
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LEONARD W. WAGMAN, of Golenbock and Barell, New York City, *for petitioners.*

MARTIN ROSEN, New York City, for William J. Adams, d/b/a Beacon Hill Company, Coral, Inc., and Louis Rait, Inc., *in opposition.*

CLARK, *Circuit Judge*:

The petitioners herein seek a writ of mandamus to compel Judge Bruchhausen to vacate an order substituting them as the parties defendant in an action pending before him in the Eastern District of New York. The petition was filed a few days after we had dismissed a direct appeal from the order for lack of a final judgment. Involved also is an unappealable[1] order of remand of the action to the state court from which it had originally been removed, since the substitution of parties destroyed diversity of citizenship. Defendants, relying on a claim that the district court has not secured jurisdiction over them, vigorously press their contention for a review of this issue by mandamus as the only means available to them, Judge Bruchhausen having denied their application for an interlocutory appeal under 28 U. S. C. §1292(b). But since defendants, by their own ad-

[1] "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U. S. C. §1447(d); and see *Kloeb* v. *Armour & Co.*, 311 U. S. 199, 205; *Stein's Stores* v. *Taylor*, 6 Cir., 216 F. 2d 439 (refusing review by mandamus).

mission and claim, are the real parties in interest to defend the pending action, we find their objections purely delaying and technical, not rising to the level required to justify the issuance of the extraordinary writ of mandamus.[2] The case is now in that place and that posture which are wholly appropriate and have been indicated as such from the outset; further preliminary sparring can at the utmost procure only a direction that the amended complaint be served upon the defendants, rather than upon their counsel. As we point out below, even in the doubtful event that such a direction might prove desirable, we shall not call upon the extraordinary powers of this court to permit us to indulge in so futile and useless a gesture.

The original action, *Adams v. Beland Realty Corp.*, was brought in the state court in 1954 by certain tenants of stores in an eight-story business block in Queens, New York City, against Beland Realty Corp., a New Jersey corporation, as owner. Judge Bruchhausen in his opinion below states the uncontested facts succinctly as follows:

> "On January 18, 1954, the plaintiffs allegedly sustained property damage as a result of the flow of water into premises occupied by them as tenants of 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of said premises. The summons and complaint were served upon Ernest Boehm, the superintendent and manag-

[2] *Abrams v. McGohey*, 2 Cir., 260 F. 2d 892; *General Houses, Inc. v. Bruchhausen*, 2 Cir., 256 F. 2d 674; *Electric & Musical Industries Limited v. Walsh*, 2 Cir., 249 F. 2d 308; *Torres v. Walsh*, 2 Cir., 221 F. 2d 319, 321, certiorari denied 350 U. S. 836; *In re Chappell & Co.*, 1 Cir., 201 F. 2d 343.

ing agent of the premises. The complaint described the defendant owner as a New Jersey corporation. The action originally was commenced in Queens County Supreme Court. The defendant denied ownership, operation and control of the premises. It thereupon sought removal of the action to this court because of diversity of citizenship. The removal petition was signed by Joseph W. Levin, assistant secretary of Beland Realty Corporation of New Jersey. In his affidavit of January 3, 1955, Mr. Levin alleged that the corporation was in existence pursuant to the laws of the State of New Jersey. However, a certificate of voluntary dissolution was filed May 1, 1952. The stock of this corporation was owned by a New York corporation known as Beland Realty Corporation. This New York corporation owned the premises in question up to May 1, 1952 when it was dissolved. Its property was transferred to the individuals named above d b a Beland Realty Company, a partnership. The defendant corporation was represented at first by the law firm of Colenbock and Barell and then by Max J. Gwertzman, the subrogation attorney. Extensions of time to appear and answer were given to both attorneys. Examinations before trial of both parties were held and the case placed on the trial calendar. At the pre-trial call before Judge Savage the corporation moved for dismissal of the complaint on the ground of non-ownership, management or control. At that pre-trial, a deed was exhibited by counsel from the the corporation to the partnership transferring the premises to the named individuals. All proceedings were conducted in the name of the dissolved corporation although dissolution was approximately two years prior to the cause of action. All notice of claims and pleadings were turned over to

> the attorneys for the partnership who in turn forwarded them to the attorneys for the insurance company." *Adams v. Beland Realty Corp.*, Civ. No. 15081, D. C. E. D. N. Y., Sept. 22, 1960.

The present proceedings was initiated by a motion thereafter made on behalf of the then plaintiffs pursuant to F. R. C. P. 15 and 4(h) to amend the title by substituting the present petitioners, doing business as Beland Realty Company, as party defendants, in place of Beland Realty Corp." The defendant contended that a granting of the motion would constitute a substitution of a new party and thereby deny the defendant partnership the benefit of the statute of limitations. But Judge Bruchhausen pointed out that here "the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. * * * The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to dismiss before Judge Savage, after the statute of limitations had expired. It is evident that no prejudice will flow to the defendant from a granting of this motion." And he granted the motion, ordering a complete substitution of parties defendant; additionally he ordered the remand to the state court, since the parties were now all citizens of New York. When the appeal from the order of substitution came before us on October 19, 1960, we granted the plaintiffs' motion to dismiss, since obviously the defendant corporation was not injured by its elimination from the lawsuit and no final action had been taken against

the substituted defendants, who now had full opportunity to defend. This petition, dated October 27, 1960, followed.

F. R. 81 (c) provides as to "Removed Actions": "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders." See *Freeman v. Bee Machine Co.*, 319 U. S. 448, upholding amendment to state a new claim after removal. Thus Judge Bruchhausen had clear authority to order the amendment substituting parties, see F. R. 21, 25(d) (c); and it was his manifest duty to do so and to make sure that the real issue was litigated between the parties actually involved. Moreover, the defendants knew, even more than the plaintiffs, that the issue was one for the state court where (so we are told) there is already an action pending against them involving these issues. There is no permanent prejudice to them to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for, whatever its past vicissitudes, the case has remained pending and obviously must now be heard in the proper tribunal therefor.

The only possible contention they have is that actually they are strangers, being newly inducted into the litigation, and hence are entitled to service of process anew.[*] Perhaps

[*] This could be had just as was the original service, by serving the superintendent at the building in Queens. F. R. 4(d) (3). If actualities may be considered, this is obviously more indirect a ful than service upon counsel under F. R. 5.

the trial judge might have been well advised to have ordered this simple and here essentially useless formality and thus have removed petitioner's last talking point. And were mandamus to issue, it would have to be limited to that one step, since every other step taken is so definitely required in equity and justice. But we do not think the writ is available for so profitless a venture. So concluding, we shall not pause to consider whether petitioners may still be entitled to raise this objection or whether they may not be foreclosed by their continued defense in the name of the corporation as owner and by their present appeal or whether in any event under the circumstances of complete knowledge which they possessed service upon their counsel is not adequate under F. R. 5. See *Fricano* v. *Bee Machine Co.*, *supra*, 319 U. S. 448, 455; *Adam* v. *Saenger*, 303 U. S. 59, 67-68. The obvious lack of any real prejudice to them makes issuance of the writ an act of supererogation.

Petitioners also seek various forms of additional relief which either are rendered inappropriate by our conclusion or are not properly available to them. Certainly we have no right or desire to control the trial judge's exercise of discretion in denying leave for an interlocutory appeal. All defenses on the merits now properly go before the state court for definitive adjudication; our function has been merely to pass on the procedural aspects of the proceedings as brought before us. We see no reason either to grant or to continue to stay prevailing the remand to the state court.

Accordingly the petition for a writ of mandamus and for other forms of relief is denied *in toto*.

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FRIENDLY, *Circuit Judge* (dissenting);

In my view the correct path here is the one Judge Clark has so clearly discerned but has then declined to follow. That is to grant the petition for mandamus to the limited extent of directing modification of the order of the District Judge to permit the service of an amended complaint upon the partnership and to leave all questions of the effect of this action to the state court. Far from that being a profitless venture, it seems to me essential not merely to protect these petitioners, whose conduct may not have been overly appealing, but to prevent unwarranted intrusion into the domain of the New York courts where the action began and where it will end.

The extract from Chief Judge Bruchhausen's opinion does not fully convey the never-never quality of this case. The action giving rise to the petition for mandamus was brought in October, 1954, in the Supreme Court, Queens County, by residents of New York, tenants under leases from the petitioners, a partnership, all but one of the partners being New York residents. Plaintiffs sought to recover for damage to their property sustained in January, 1954. The real estate records of Queens County showed, as did the leases, that the premises were owned by the partners, doing business as Beland Realty Co. Nevertheless, for reasons not disclosed or, perhaps, without them, plaintiffs brought their action against Beland Realty Corporation, a New Jersey corporation. Service was made upon the building superintendant as managing agent; under New York law, although this may have been good as against the New Jersey corpo-

ration named as defendant, it would not have been against the partnership, Civil Practice Act, §§229, 222a. Early in 1955 the New Jersey corporation removed to the federal court for the Eastern District of New York; the allegation of continued corporate existence in the removal petition was untruthful but this may not have been prejudicial to plaintiffs since the defendant's answer, filed simultaneously with the petition for removal, denied ownership, operation and control of the property and the dissolution did not remove liability for any debts the corporation had. In the federal court the action slumbered, only briefly awakened by a dismissal for want of prosecution in 1956 and subsequent restoration to the calendar, until early 1959. Then a pretrial conference was had and an order made directing a preliminary trial of the issue of liability of the corporate defendant, as distinguished from the general merits of the action. Apparently believing that such a trial would go against them, plaintiffs moved in June, 1960, to amend the caption of the action so as to make the partners defendants in lieu of the New Jersey corporation.

The obvious reason for plaintiffs' proceeding in this fashion was that the applicable statute of limitations, Civil Practice Act, §49(6), was three years. It must likewise have been apparent that granting plaintiffs' motion would immediately terminate federal jurisdiction by eliminating diversity of citizenship and would thus require remand. However, the court permitted the amendment and made clear the intended effect of this by stating, "Under Rule 15(c) of the Federal Rules of Civil Procedure amendments relate back to the date of original pleading."

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Although the order sounds in terms of "substitution" of the partners for the corporation, this is colloquial rather than technical language; "substitution," as used in F. R. Civ. Proc. 25, refers to cases where one person has been clothed with the rights or liabilities of another. The motion was rather for amendment of the complaint under Rule 15 and of the summons under Rule 4(h).

When a summons is originally served in the federal court and the action is to remain there, the test whether such an amendment should be allowed has been stated to be "whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person." 2 Moore, Federal Practice (2d ed. 1948), p. 1042. See, allowing amendment, *United States* v. *A. H. Fischer Lumber Co.*, 162 F. 2d 872 (4th Cir. 1947); *Grandey* v. *Pacific Indemnity Co.*, 217 F. 2d 27 (5th Cir. 1954); *Taormina Corp.* v. *Escobedo*, 254 F. 2d 171 (5th Cir.), cert. denied, 358 U. S. 827 (1958); *Jackson* v. *Duke*, 259 F. 2d 3 (5th Cir. 1958); not allowing amendment, *Kerner* v. *Rackmill*, 111 F. Supp. 150 (M. D. Pa. 1953); *Harris* v. *Stone*, 115 F. Supp. 531 (D. C. 1953). The confused record here leaves it questionable whether plaintiffs brought themselves within this test, and the opinion of the district judge affords no indication that he applied it.

However, I do not reach that issue since I think what was done to have been improper even if that point should be

taken in plaintiffs' favor. The summons was served on the superintendent while the action was in the New York courts. Under Civil Practice Act, §222a, that would not have been good service against the partnership even if the summons has named the partners in the first instance. I cannot read F. R. Civ. Proc. 81(c), whereby the Federal Rules "apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal," as permitting a federal court to combine rules 4(d)(3) and (h) so as to impart retroactive validity to a state court summons where the defect was not merely improper description but improper service. In this respect the case seems to me to fall under the principle of *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377 (1922), rather than of *Freeman* v. *Bee Machine Co. Inc.*, 319 U. S. 448 (1943), see *Bomze* v. *Nardis Sportswear, Inc.*, 165 F. 2d 33, 35 (2d Cir. 1948). However, if a federal court does have the power to perform this Lazarus-like feat, how singularly inappropriate to use it here, where, at the moment of exercising jurisdiction to breathe into the New York summons a vitality over the partners which the summons could never have had in New York, the federal court lost the very jurisdiction it was exerting!

When we get behind the procedural niceties of amendment and fictions of relation back and the fascinating metaphysical inquiry how a court can exercise a power the basis for which is destroyed by the act of exercise, one stark truth emerges. The real dispute between these litigants is whether plaintiffs should be allowed to begin formal pursuit of the individual defendants more than three years after

the cause of action accrued. See *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 233 (1959); *Fitzgerald's Estate*, 252 Pa. 568, 97 Atl. 935 (1916); Dawson, Estoppel and Statutes of Limitation, 34 Mich. L. Rev. 1 (1935). This is a controversy, mainly between residents of New York, in an action begun in the courts of New York and now being returned there, and actually being litigated in another action brought by the plaintiffs against the individual defendants in the Supreme Court, New York County, in January, 1960. The only interest a federal court may legitimately take in this controversy among residents of New York is to take no interest. If plaintiffs no longer wish to pursue the New Jersey corporation in the federal court, well and good; but the federal court should restore the action to the state court in a fashion that will leave the state court free to determine the case as the state court sees fit, see *Waco* v. *Fidelity & Deposit Co.*, 293 U. S. 140 (1934), and not impose its own views on a matter purely of state cognizance[1] and in a manner conclusive on the state court and, so far I can see, unreviewable anywhere. Failure by the district court to do this is precisely the kind of situation calling for mandamus. 6 Moore, Federal Practice (2d ed. 1953), p. 59.

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[1] We are told that under New York practice, 'As to new parties defendant brought in by an amendment, a suit is begun only when they are brought in by the amendment and the service of the amended process.' 2 Carmody-Wait, Cyclopedia of New York Practice (1952), p. 343. See *Gray* v. *H. H. Vought & Co.*, 216 App. Div. 230 (1st Dept. 1926); *Abrams* v. *General Financial Corp.*, 274 App. Div. 756 (1st Dept. 1948).

APPENDIX IV

Order of Affirmance of Appellate Division

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 13th day of November, 1962.

Present—

HON. HENRY L. UGHETTA,
Acting Presiding Justice.
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" JAMES D. HOPKINS,
Justices.

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, ET AL.,
Appellants,

—v.—

MYRTLE G. HIRSCH, ET AL.,
Respondents.

ORDER ON APPEAL FROM ORDER

The above named William J. Adams, d/b/a Beacon Hill Company, Coral, Inc., and Louis Rait, Inc., plaintiffs in this

action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Queens on the 15th day of May, 1961, which granted defendants' motion, made pursuant to section 237a of the Civil Practice Act, to dismiss the action on the ground that process had not been served on any of the defendants and that the court was without jurisdiction, herein, and the said appeal having been argued by Mr. O. John Rogge of Counsel for the appellants and argued by Mr. Leonard W. Wagman of Counsel for the respondents, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the order so appealed from be and the same hereby is unanimously affirmed, without costs.

Enter.

JOHN J. CALLAHAN,
Clerk.

APPENDIX V

Denial of United States Supreme Court for Stay

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

December 12, 1960

Leonard W. Wagman, Esquire
60 East 42nd Street
New York 17, N. Y.

Re: *Myrtle G. Hirsch, et al., v. United States Court of Appeals for the Second Circuit*

Dear Sir:

Your application for stay, together with opposition thereto, in the above-captioned cause was presented to Mr. Justice Harlan, who has today denied the application with the following endorsement thereon:

> "I can find no equity in this application nor any other reason for granting the stay which the Court of Appeals has denied. Application denied.
>
> 12 12 60 JMH."

Very truly yours,

JAMES R. BROWNING, CLERK
By /s/ E. P. CULLINAN
E. P. Cullinan
Deputy

EPC: jmh
cc: Martin Rosen, Esquire
170 Broadway
New York 38, N. Y.

A. Daniel Fusaro, Esquire
Clerk, U.S. Court of Appeals
for the Second Circuit
New York 7, N. Y.